Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications, Inc.	)	
Pursuant to Section 271 of the	)	CC Docket No. 97-121
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA	)	
Services in Oklahoma	)	

COMMENTS IN OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
[redacted]

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/775-3664

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications, Inc.	)	
Pursuant to Section 271 of the	)	CC Docket No. 97-121
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA	)	
Services in Oklahoma	)	

COMMENTS IN OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association, Inc. ("NCTA"), the principal trade association of the cable television industry, hereby submits these comments opposing the grant of the Application of SBC Communications, Inc. ("SBC") provide in-region interLATA services in Oklahoma ("Application").

INTRODUCTION AND SUMMARY

Section 271 of the Telecommunications Act of 1996 ("Act" or "1996 Act") represents a fundamental Congressional policy decision designed to promote the statute's core competitive purposes: the Bell Operating Companies (BOCs) may not provide in-region interLATA services in a particular State until both business and residential consumers have a meaningful opportunity to choose among two or more facilities-based providers of local exchange service that are competing on a level playing field.

In its Application, SBC advances the untenable position that the 1996 Act permits it to enter the in-region, interLATA services market based upon a combination of provisions set forth in an interconnection agreement with Brooks Fiber and its Statement of Generally Available

Terms and Conditions ("Statement") filed with the Oklahoma Corporation Commission (OCC). In fact, however, the Act prohibits SBC from using its Statement as a mechanism for demonstrating compliance with the competitive checklist, since several competitive local exchange carriers have made timely requests for interconnection with SBC. Congress intended that the "Track A" and "Track B" approaches be mutually exclusive. The statute and the legislative history make clear that Track B was designed as a fallback approach that would be foreclosed where, as here, a CLEC had made a timely request for interconnection from a BOC. Accordingly, SBC's Application must stand or fall based upon whether it meets the requirements of Track A.

SBC's Application falls far short of satisfying the Track A criteria. Contrary to SBC's assertions, there is no facilities-based competitor in Oklahoma furnishing local exchange service exclusively or predominantly over its own facilities to both business and residential subscribers. While several competitive local exchange carriers in Oklahoma have sought interconnection agreements with SBC, only one company, Brooks Fiber, is presently operational. Brooks Fiber, however, is not furnishing local telephone service to any residential subscribers. Thus, SBC fails to meet the threshold requirement of Section 271(c)(1)(A).

Nor has SBC fully implemented the Act's competitive checklist through the actual furnishing of each of the fourteen checklist items to a competitor or competitors in accordance with the Act's requirements. Indeed, SBC presently does not furnish several of the Act's key checklist items to any competitor in Oklahoma. While SBC is providing other checklist items to a competitive local exchange carrier (CLEC), it is not doing so in the statutorily-prescribed

manner. Under these circumstances, there is no basis for concluding that the Act's competitive checklist is fully implemented.

The public interest also compels denial of the Application. Granting SBC's request at this juncture would imperil the prospects for effective local competition in Oklahoma, and establish a precedent for BOC entry into in-region interLATA services that would drastically curtail the prospects nationwide for meaningful competitive choice in local telephony. Congress intended that the opportunity to provide in-region interLATA service would induce the BOCs to open their local exchange monopolies to facilities-based competitors in accordance with the competitive checklist embodied in section 271.[1/] The Commission itself has recognized that the BOCs "have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect and make use of the incumbent LEC's network services."[2/]

If authorized prematurely to provide in-region interLATA services, SBC would have a substantially reduced incentive to negotiate and implement access and interconnection agreements

---

1/ In discussing the Senate version of Section 271, which was adopted by the Conference Committee, Senator Kerrey noted that "[t]he way to overcome this ability of the RBOCs to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition." See e.g., 141 Cong. Rec. S8139 (daily ed. June 12, 1995) (statement of Sen. Kerrey). Likewise, during House consideration of the Conference Report, Rep. Hastert stated that "[f]air competition means local telephone companies will not be able to provide long-distance service in the region where they have held a monopoly until several conditions have been met to break that monopoly." 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert)(emphasis added).

2/ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996) ("Local Competition Order") at ¶ 55.

that provide new entrants with a meaningful opportunity to compete. Indeed, prior to enactment of the 1996 Act, new entrants in local telephony encountered unreasonable delays in the deployment and installation of trunks, the switching of customers from incumbents to new entrants, the issuance of numbering resources to competitors, and the provisioning of number portability.[3/]

By making BOC entry into long distance contingent upon "full" implementation of interconnection agreements with new entrants, Congress sought to ensure that the BOCs would carry out their duties under such agreements in a timely and useful manner. That incentive, however, disappears once the BOCs are permitted to enter the long distance market. The importance of the local competition incentive embodied in Section 271 is vividly illustrated by the fact that two ILECs already authorized to provide long distance service, GTE and SNET, have led the effort to invalidate the local competition rules recently promulgated by the FCC under Section 251 of the Act.[4/] Absent countervailing incentives, monopolists will vigorously resist efforts to open their markets to competition not only via litigation, but also through negotiation delays, protracted provisioning of services, and other stalling tactics.[5/] Lacking the

---

[3/] See e.g., "The Big Boys Come Calling," New York Times, October 23, 1995, at D1, D6; "Calls Waiting, Rivals Are Hung Up On Baby Bells' Control Over Local Markets," Wall Street Journal, October 24, 1995, at A1, A6.

[4/] See "Telecom Law Faces Challenge in Court," Wall St. Journal, August 29, 1996, at A3.

[5/] See e.g., United States v. American Tel. & Tel. Co., 524 F.Supp. 1336, 155-56 (D.D.C. 1981); United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 161, 171, 187-88, 195, 223 (D.D.C. 1982); MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33, 1139-40, 1159; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408, 5450 (1994).

incentive of access to a new revenue stream, GTE and SNET have aggressively sought to preserve their local exchange monopolies.[6/] Their conduct amply demonstrates that prematurely granting SBC's Application would halt the progress toward local competition in Oklahoma.

I. BECAUSE SEVERAL CLECs HAVE MADE TIMELY REQUESTS FOR INTERCONNECTION AGREEMENTS, THE ACT FORECLOSES SBC FROM RELYING UPON TRACK B

Section 271 effectuates the 1996 Act's objective of "opening all telecommunications markets to competition" by using the BOCs incentive to enter the long distance business within their regions as a means of spurring them to take the necessary steps to engender competition in their monopoly local service markets.[7/] To that end, Section 271(c)(1)(A) provides that BOC entry into in-region interLATA services may not occur absent the presence of at least one or more interconnection agreements with a facilities-based local competitor that implements the Act's competitive checklist.[8/]

6/ GTE, the largest local exchange company in the country, has sought to skirt obligations under Section 251 of the Act by asking state regulators for relief from such requirements pursuant to an exemption that Congress designed for small and rural telcos. See "Virginia Rejects GTE's Request for Rural Status," Multichannel News, November 11, 1996, at 34 (quoting spokesman for State commission as saying that granting GTE's request "really would have slowed down the entrance of competition into GTE's service area"); "Why Phone Rivals Can't Get Into Some Towns," Wall Street Journal, August 19, 1996, at B1 (noting that GTE "plans to invoke a little-known provision in the new law that exempts rural phone companies and small operators from a raft of rules that would ease rivals' entry into their markets"). SNET, which dominates the local market throughout the State of Connecticut, also has sought to invoke the small carrier exemption in order to avoid duties under Section 251. See id. at B3.

7/ See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 ("Conference Report").

8/ 47 U.S.C. § 271(c)(1)(A).

Congress established a narrowly tailored exception to the general requirement set forth in Track A. By its terms, this exception is only operative if, any time ten months after the date of enactment (*i.e.*, December 8, 1996), no competitive provider "requested the access and interconnection described in [Track A] before the date which is 3 months before the date the company makes its application."[9/] SBC concedes that, by January 11, 1997 (*i.e.*, three months before it filed its application), several competitive providers, including Brooks Fiber, had not only requested to enter into, but had actually consummated, interconnection agreements with SBC. Under such circumstances, SBC is foreclosed from relying on Track B as a basis for entering the in-region, interLATA services market.[10/]

To support its argument that reliance on Track B is permissible in this instance, SBC has fundamentally misstated the requirements of Section 271. Indeed, SBC's construction of the statute effectively renders Track A a nullity. SBC contends that Track A is disabled if, either three months before it filed its Application, or on the date the application was filed, no CLEC with whom it has an interconnection agreement "qualifies" as a facilities-based provider of business and residential local service.[11/] Instead of construing Track B to be an exception

---

9/ 47 U.S.C. § 271(c)(1)(B).

10/ See Application of Ernest G. Johnson, Director of the Public Utility Division, Oklahoma Corporation Commission, To Explore the Requirements of Section 271 of the Telecommunications Act of 1996, Cause No. PUD 970000064, ("OCC Section 271 Proceeding"), Comments of the Oklahoma Attorney General, March 11, 1997 (attached at Bundle 9, Tab 22), at 1-5.

11/ SBC Brief in Support of Application ("SBC Brief") at 14-15. (Track B is available if "no CLEC, including Brooks Fiber, qualifies as a facilities-based provider of business and residential local service within the definition of subsection 271(c)(1)(A); or . . . no CLEC so qualified prior to the 3-month filing 'window' Congress provided in subsection (B)").

which only applies in the absence of a timely request for interconnection from a competitor seeking to become a facilities-based provider of telephone exchange service, SBC turns the law on its head.[12/] It construes the statute so that, after December 8, 1996, Track B would virtually always apply unless a competitor who already qualifies as a predominantly facilities-based provider to business and residential subscribers receives or requests access and interconnection three months before the BOC files its Application.[13/] This interpretation effectively nullifies Track A interconnection agreements as a means of stimulating local competition. SBC completes its evisceration of Track A by baldly asserting that Track B is available at any time after December 8, 1996 if "Southwestern Bell otherwise complies with the requirements of subsection (B)."[14/]

The Commission should soundly reject SBC's interpretation of Section 271. By its terms Track B only applies where, as stated in the heading to subsection (B), there is a "failure to

---

12/ Congress clearly established Track A as the preferred mechanism for triggering BOC entry into the in-region long distance business. The entry test enacted into law was based upon the House version. See Conference Report at 147. The House Report describes the presence of a facilities-based local competitor as "the integral requirement of the checklist." H.R. Rep. No. 104-204, July 24, 1995 ("House Report"), at 76-77. Likewise, the Report notes that "The Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance." Id. at 77. The outcomes expressly preferred by the entry test drafters as a prerequisite to BOC provision of in-region, interLATA services are only possible via Track A.

13/ See id. at 15, n.15 (contending that because Brooks Fiber "commenced its facilities-based service on January 15 of this year," *i.e.*, less than three months before SBC filed its Application, SBC may proceed under Track B).

14/ Id. at 15.

request access."[15/] Here, as SBC admits, there has been no such failure to request access by a CLEC that is in the process of becoming a predominantly facilities-based provider of local telephone service to business and residential customers. Thus, Track B is inapposite.[16/] The fact that neither Brooks Fiber, nor any other CLEC with whom SBC has either negotiated or completed interconnection agreements, has yet to emerge as a such a provider, does not resurrect Track B. Instead, it simply means that SBC's application should not be granted until the Congressional policy of using the BOCs' long distance entry incentive to facilitate meaningful local competition has been accomplished.[17/]

SBC contends that this reading of the statute is somehow unfair to the BOCs, since it denies them control over the timetable for their entry into long distance.[18/] Congress, however, expressly considered and took into account this issue in fashioning Section 271. Not only does Section 271 specify that if, ten months after enactment, there is a failure to request access, a BOC can proceed under Track B, it also provides that a CLEC's failure to negotiate in good faith or comply with a timetable specified in an interconnection agreement will be treated as a failure to request access.[19/] Thus, Congress specifically considered and addressed

---

15/ 47 U.S.C. § 271(c)(1)(B).

16/ See House Report at 77-78 (describing Track B as applicable if a "would-be competitor" fails to "step forward and request access and interconnection as prescribed in the legislation").

17/ Unsurprisingly, SBC ignores Congress's clear intent by asserting that "consumers would suffer if ... [facilities-based local] competition were compulsory before Bell companies could enter long distance in their home regions." Id. at 13.

18/ See SBC Brief at 13-14.

19/ 47 U.S.C. § 271(c)(1)(B).

the circumstances under which delay by CLECs would unfairly delay BOC entry into long distance within their home markets.

Tellingly, SBC's construction of Section 271 would mean that obstructionist and delaying tactics by the BOCs in the course of interconnection agreements would carry no penalty, since Track B would become automatically available any time after December 8, 1996. If SBC's reading of the statute prevails, no BOC would have any incentive to enter into, or faithfully execute, meaningful interconnection agreements with local competitors -- an outcome directly at odds with the policy objective underlying Section 271 and the Act as a whole. This result would be especially problematic in Oklahoma, since Brooks Fiber has stated that it has encountered resistance from SBC in connection with the effective implementation of the SBC/Brooks agreement.[20/] Moreover, Brooks Fiber has indicated that it acquiesced to sub-optimal agreement provisions due to time constraints and an expectation that a most-favored nation clause within its agreement would permit it to benefit from better terms subsequently negotiated by other competitors in Oklahoma, such as AT&T.[21/] If SBC's view prevails, however, there would be no incentive for SBC to negotiate better terms with any other competitor in the State.

[20/] See OCC Section 271 Proceeding, Initial Comments of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc., March 11, 1997 (attached to Application at Bundle 9, Tab 23) ("Initial Brooks Comments to OCC"), at 4.

[21/] Id. at 5-6.

II. SBC HAS NOT MET THE FUNDAMENTAL REQUIREMENT OF SECTION 271(c)(1)(A)

SBC contends that its "implemented agreement with Brooks Fiber satisfies all the requirements" of Section 271(c)(1)(A).[22/] To satisfy the requirements of "Track A," SBC must be furnishing network access and interconnection to at least one unaffiliated competitor that provides telephone exchange service to both business and residential consumers predominantly over its own facilities.[23/] The Act's legislative history expressly states that the "requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational."[24/] SBC cannot demonstrate that it has met these criteria.

As set forth in ALTS' Motion to Dismiss, Brooks Fiber presently does not, in fact, serve any residential customers.[25/] Brooks is in the midst of a market test of local telephone service to four residential customers, each of whom are Brooks employees.[26/] Moreover, each of the four employees receiving the Brooks trial offering are obtaining service via resale of SBC

22/ SBC Brief in Support of Application ("SBC Brief") at 12.

23/ 47 U.S.C. § 271(c)(1)(A).

24/ Conference Report at 148.

25/ Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services, April 23, 1997 ("ALTS Motion to Dismiss") at 3.

26/ Id.

service.[27] Thus, Brooks is clearly not an operational provider of facilities-based local telephone service to residential subscribers.[28]

Likewise, the scale and scope of Brooks' competitive offering is clearly inadequate to satisfy the requirements of Section 271(c)(1)(A). Strict adherence to the "operational" standard requires that authorization be withheld absent concrete evidence that the interconnection agreements mandated by the Act have actually engendered the competitive choices for residential and business customers envisioned by Congress. The legislative history of Section 271 characterizes the "initial forays of cable companies" into local telephony as holding "the promise" of the kind of competition the Act seeks to promote.[29] The Conference Report specifically notes, for example, that Jones Intercable is actively pursuing plans to offer local telephony "in significant markets" and that Cablevision has entered into an interconnection agreement with New York Telephone "with the goal of" providing service on Long Island to 650,000 people.[30]

The reference to "the promise" held by the "initial forays" of cable companies suggests that Congress did not intend for nascent local telephone operations provided by competitors, such

---

[27] Id.

[28] Brooks Fiber OCC Comments at 11 ("it strains credulity to suggest that -- in comparison with SWBT's ubiquitous network - Brooks' current provision of service over its finite transmission rings constitutes the offering of service 'exclusively... or predominantly over [its] ... own telephone exchange service facilities...', particularly given the current lack of broad availability of SWBT unbundled loop facilities").

[29] Conference Report at 148.

[30] Id.

as that offered by Brooks Fiber, to permit entry under Section 271(c)(1)(A). Congress directed that BOC entry into in-region interLATA services could only be triggered in States where "operational" facilities-based providers offered "meaningful" competition for both business and residential subscribers.[31/] The Application identifies only one competing provider furnishing service to business and residential subscribers in Oklahoma, Brooks Fiber, which serves only 20 business subscribers and provides a trial offering of residential service to four of its employees.[32/] Thus, the scale and scope of Brooks Fiber's local exchange operations do not offer an adequate basis for determining that business and residential customers in Oklahoma have a meaningful choice of viable and durable local service providers.[33/] The provision of competing local exchange service to a handful of a State's business subscribers cannot be construed to satisfy Section 271's requirement of "meaningful facilities-based competition."[34/]

31/ See id. at 148.

32/ Brook Fiber Comments to OCC at 2.

33/ See Brooks Fiber OCC Comments at 11 ("the 'exclusively/predominantly' test, reasonably interpreted, is one of effective freedom from dependence on the incumbent . . . facilities").

34/ Conference Report at 148. See also House Report at 77 ("It is also the Committee's intent that the competitor offer a true 'dialtone' alternative within the State, and not merely offer service in one business location that has an incidental, insignificant residential presence").

III. SBC HAS NOT MET THE ACT'S REQUIREMENT THAT ALL ITEMS IN THE COMPETITIVE CHECKLIST BE FULLY IMPLEMENTED IN ACCORDANCE WITH THE ACT'S REQUIREMENTS

A. The "Full Implementation" Criterion Requires SBC to Actually Be Furnishing to Competitors All of the Items in the Competitive Checklist

Section 271(d)(3)(A) precludes a BOC from being authorized to enter the long distance business under Track A unless it has "fully implemented" all of the items in the competitive checklist.[35/] The Act requires the BOCs to fully implement all of the checklist items in agreements with "operational" competitors in order to ensure that competition is not hampered by a BOC's failure to provide, or inadequate provision of, any of the checklist items.[36/] The checklist represents Congress' policy judgment regarding the essential prerequisites for the emergence of competitive alternatives to the BOCs' local exchange monopolies.[37/]

While subsection (c)(1)(A) conditions BOC entry upon the presence of a predominantly facilities-based provider, subsection (c)(2) requires "full implementation" of all checklist items in order to ensure the feasibility of competition in all markets within a particular State that is the subject of a BOC's application, including those not presently served by a predominantly facilities-based provider. The presence of a facilities-based provider represents "tangible

---

[35/] See 47 U.S.C. § 271(d)(3)(A)(i) (requiring full implementation of the competitive checklist); id., § 271(d)(4) (barring the Commission from limiting the terms used in the competitive checklist).

[36/] See Conference Report at 148.

[37/] The House Report states that "[i]n the Committee's view, the 'openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those [checklist] requirements." House Report at 77.

affirmation" that a particular State "is indeed open to competition."[38] At the same time, the full implementation of the checklist by a BOC with an operational competitor ensures the feasibility of entry throughout that State, particularly in areas not served by the competitor triggering entry under Track A:

> The requirement of an operational competitor is crucial because, under the terms of section 244, whatever agreement the competitor is operating under must be made generally available throughout the State. Any carrier in another part of the State could immediately take advantage of the 'agreement' and be operational fairly quickly. By creating this potential for competitive alternatives to flourish rapidly throughout the State, with an absolute minimium of lengthy and contentious negotiations once an initial agreement is entered into, the Committee is satisfied that the 'openness and accessibility' requirements have been met.[39]

SBC's Application indicates that it is not actually furnishing several checklist items -- including local switching and local loops -- to any competitor pursuant to an access and interconnection agreement.[40] The Commission cannot grant the instant Application unless SBC is actually providing each of the 14 items in the competitive checklist to one or more competitors within Oklahoma. The Act's full implementation requirement presupposes an operational, "on-the-ground" assessment of the efficacy with which checklist items are being provided.[41] The Application precludes such an assessment because several checklist items are not actually be furnished to an operational competitor.

---

[38] Id.

[39] Id.

[40] See SBC Brief at 11; id. at 30-32; Brooks Fiber OCC Comments at 3 ("Brooks is not yet in a position to begin utilizing SWBT's unbundled loop facilities in Oklahoma").

[41] See Conference Report at 148; House Report at 76-77.

SBC makes two principal contentions to support its claim of compliance with the checklist, neither of which are supported by the statute. First, it argues that a BOC can demonstrate checklist compliance through a combination of provisions in an interconnection agreement with a CLEC under Track A and a Statement filed with the State commission under Track B.[42/] As demonstrated previously, a BOC cannot "mix and match" agreement provisions with Statement provisions.[43/] Tracks A and B are mutually exclusive, as demonstrated by Congress' decision to separate them through the use of the disjunctive.[44/]

Second, SBC asserts that a BOC "'provides access' to its facilities and services through an interconnection agreement when the CLEC has a contractual right to obtain the facilities and services, whether or not they are taken."[45/] This reading of the statute wholly undermines the purpose of establishing a checklist, since it would permit the BOCs to enter the long distance markets based upon promises, rather than performance, regarding opening their local monopolies to competitors. The analysis of whether the "full implementation" requirement has been met necessitates tangible data regarding the manner in which the essential building blocks for competition are being provided to new entrants.[46/] The Act's purposes would be thwarted by permitting SBC to enter the long distance market before there has even been an opportunity to

---

42/ SBC Brief at 15.

43/ See supra at Section I.

44/ See 47 U.S.C. § 271(c)(1).

45/ SBC Brief at 16 (emphasis added).

46/ See Conference Report at 148; House Report at 76-77.

engage in an operational assessment of the efficacy of the competitive checklist in fostering "meaningful facilities based competition."[47/]

The Commission should reject SBC's contention that it would be "nonsensical" to require a BOC to submit an agreement (or agreements) under which all checklist items are being furnished.[48/] The full implementation requirement ensures that SBC cannot frustrate "meaningful" local competition State by obtaining interLATA authorization based upon a stripped-down interconnection agreement that omits key items but suffices for a competitor during its nascency.[49/] The requirement also ensures that the Commission makes its entry determination based upon a pragmatic assessment of the BOC's actual performance in furnishing each checklist item to competitors. SBC -- and any other BOC applicant -- would frustrate these objectives if it were granted entry even in States where it failed to actually furnish one or more checklist items to competitors.

NCTA does not dispute that a BOC may "mix and match" individual checklist items from different agreements in order to satisfy the "full implementation" requirement through a

---

47/ See infra at Section III.B (describing operational defects -- and competitive implications thereof -- of SBC's failure to furnish collocation and number portability in accordance with the Act's requirements).

48/ Id. at 17.

49/ Indeed, this dynamic appears to be at work in this instance. Brooks Fiber has indicated that its agreement with SBC does not contain optimal terms and conditions regarding a number of key items due to timing considerations and its assessment that the MFN clause in the agreement would enable Brooks to obtain better terms and conditions as other CLECs entered into agreements with SBC. See Brooks Fiber Comments to OCC at 5-6. If, however, the Brooks agreement can trigger entry under Track A, then SBC would have no incentive to provide other CLECs with terms and conditions that are any better than those provided to Brooks.

combination of agreements. Here, however, SBC is seeking to "mix and match" its Brooks agreement with its Statement, which the Act forbids. Demonstrating checklist compliance through a combination of agreements, moreover, is only permissible if (i) all interconnecting parties -- in accordance with Section 252(i) and the Commission's rules thereunder[50] -- are permitted to obtain any rate, term or condition set forth in an agreement approved under Section 252 and (ii) the operational effect of the combination of agreements results in the actual furnishing of all fourteen checklist items to a combination of competitors. In the instant case, however, neither of these two prerequisites are met.[51]

B. SBC Has Failed to Implement Checklist Items In Accordance with the Act's Requirements

Section 271 obligates SBC to implement the competitive checklist consistent with specific rules governing those items adopted by the Commission.[52] A number of checklist items also

---

[50] 47 U.S.C. § 252(i); 47 C.F.R. § 51.809.

[51] At the request of the BOCs and other incumbent local exchange companies (ILECs), the Commission's rule implementing Section 252(i) has been stayed by the Eighth Circuit Court of Appeals. While SBC claims in its Application that "most favored nation" clauses enable other CLECs to take advantage of provisions set forth in agreements already reached with Brooks and others, SBC Brief at 15-16, there is no guarantee that future competitors will be able to obtain such clauses in their agreements. Moreover, the efficacy of the most favored nation clauses obtained by Brooks Fiber, MFS and TCG is also uncertain since, unlike the Commission's rules implementing Section 252(i), there is not an express prohibition against the imposition of a "comparability" requirement as a precondition to a competitor's utilization of an individual interconnection element set forth in another agreement. Cf. 47 C.F.R. § 51.809. Absent such a requirement, a BOC could so narrowly tailor the terms under which checklist items are provided to a particular competitor, as to nullify any opportunity for another CLEC to take advantage of those terms under an MFN.

[52] See generally 47 U.S.C. § 271(c)(2)(B).

are subject to a non-discrimination condition.[53/] The record thus far suggests that a number of the checklist items actually furnished by SBC have not been provisioned in accordance with the Act's requirements.

Brooks Fiber has raised serious questions regarding the manner in which SBC is furnishing collocation services and number portability.[54/] Brooks has stated that it has encountered unreasonable delays in interconnecting its network facilities with SBC's unbundled loops due to SBC's "inflexible" collocation process.[55/] Regarding number portability, Brooks has "experienced problems with every one of [its] customer conversions" due to gaps between the termination of SBC service and the activation of the forwarding capabilities that transfer a call bound for a Brooks customer to its network.[56/] As a result, new Brooks customers have failed to receive incoming calls "for several hours at a time," creating "an immediate negative customer impression which can be very damaging to the success of the new entrant."[57/] In

---

[53/] Id.

[54/] Brooks Fiber OCC Comments at 3-4.

[55/] Id. at 4.

[56/] See id.; OCC Section 271 Proceeding, Report and Recommendations of the Administrative Law Judge, April 21, 1997 ("ALJ Report") at 17-18 ("From Brooks' investigation, it is their assessment that SWBT processes orders for service using [interim number portability] into steps, a disconnect of SWBT service and an activation of call forwarding to a number resident in Brooks' switch, and SWBT is not coordinating the timing of these two steps").

[57/] Brooks Fiber OCC Comments at 4. Of course, this example illustrates precisely why an operational assessment of a BOC's actual performance in provisioning checklist items is essential. See supra at Section III.A.

addition, evidence suggests that SBC is not making available operations support systems (OSS) functions to CLECs in accordance with the Act's requirements.[58/]

SBC cannot be deemed to have provided interconnection, unbundled elements and other checklist items in accordance with the Commission's pricing rules, because those rules have been stayed by the Eighth Circuit Court of Appeals. The prices set for items in SBC's agreement with Brooks were not based upon cost studies.[59/] Likewise, the rates set in the agreement being negotiated between SBC and AT&T will be interim rates, pending the completion of further cost studies.[60/]

To satisfy the requirements of Section 271(c)(2)(B), SBC must demonstrate that the prices for checklist items are based upon cost studies conducted in accordance with the standards set forth by the Commission.[61/] Interim prices for interconnection, unbundled elements, and other items that are not in accord with the Commission's rules cannot suffice to constitute compliance with the competitive checklist. Even if the courts ultimately were to find that the Commission

---

[58/] ALJ Report at 36.

[59/] Brooks Fiber OCC Comments at 6-7 ("Brooks did not have access to SWBT cost studies during the course of the negotiation process, and thus had no specific information in its possession to confirm whether the rates contained in its interconnection agreement with SWBT are set on appropriately calculated cost bases. Nor has the [OCC] been called on to make any determination on the merits regarding whether the rates contained in the Brooks-SWBT agreement interconnection are set at cost-based levels").

[60/] ALJ Report at 36.

[61/] See e.g. 47 U.S.C. § 271(c)(2)(B)(i)-(ii) (requiring that interconnection and unbundling be provided in accordance with the pricing standards delineated in Section 252(d)).

lacked authority to establish pricing standards pursuant to Section 252,[62] SBC's prices for interconnection and unbundling would still fail to satisfy the checklist because they are interim prices that have not been established in accordance with any cost studies.[63]

IV. THE PUBLIC INTEREST REQUIRES DENIAL OF SBC's APPLICATION

The public interest compels rejection of SBC's Application. The Act's objective of promoting "meaningful facilities-based competition" for business and residential local exchange subscribers has not been met in any market in the State of Oklahoma. SBC is not actually providing competitors with all of the items enumerated in the competitive checklist, and therefore has not even begun to furnish all of the statutorily-prescribed building blocks for competition.

Clearly, SBC's Application is premature. Virtually all business and residential subscribers within Oklahoma presently have a choice of only one local service provider. Granting the instant Application at this time will impede the progress toward local competition in Oklahoma by removing the Act's most effective mechanism for breaking SBC's bottleneck control over local exchange service.[64]

---

[62] Such a holding would not disturb the Commission's authority under Section 271 to determine whether a BOC's prices for interconnection and unbundled elements met the requirements of Section 252(d).

[63] See 47 U.S.C. § 252(d)(1) (requiring that rates for interconnection and unbundled elements "be based on the cost . . . of providing the interconnection or network element").

[64] See supra at nn. 1-3.

The dangers of prematurely granting the instant application are highlighted by the vigorous efforts of GTE and SNET to resist implementing the mandate for local competition set forth in Section 251. GTE and SNET have no incentive to open their networks to competition, since they already compete in the long distance business. The myriad delay tactics currently being employed by GTE and SNET demonstrate the critical importance of the local competition incentive embodied within Section 271. Once that incentive is removed, the GTE/SNET experience demonstrates that SBC can easily find ways to undermine rules that require them to negotiate and implement interconnection agreements with local service competitors seeking to offer meaningful choice to consumers.

Congress specified that the BOCs should not be permitted to enter the long distance market until there was tangible evidence that the Act had actually succeeded in stimulating significant competition from a viable, facilities-based new entrant. Thus, SBC's suggestion that its Application should be granted because there exists "the opportunity to provide local services in competition with Southwestern Bell."[65/] Neither the language of the Act nor the public interest supports removing the incentive embodied within Section 271 based upon speculation regarding what potential local competitors "can" do. Such a standard represents a recipe for premature entry that would jeopardize the robust local competition sought by Congress.

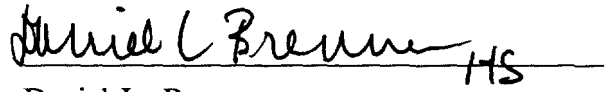
65/ See SBC Brief at 13 (emphasis added).

CONCLUSION

For the foregoing reasons, the Commission should reject SBC's Application to provide in-region interLATA services in the State of Oklahoma.

Respectfully submitted,

THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.



Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

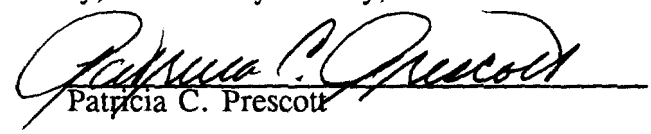
Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202/775-3664

May 1, 1997

F1/65499.1

CERTIFICATE OF SERVICE

I, Patricia C. Prescott, do hereby certify that a copy of the foregoing Comments in Opposition of The National Cable Television Association was served on the following by either first class mail, postage prepaid, or by hand delivery, this 1st day of May, 1997.



Patricia C. Prescott

Donald J. Russell
Department of Justice
Telecommunications Task Force
Antitrust Division
555 4th Street, N.W., Room 8205
Washington, DC 20001

Chairman Reed E. Hundt*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

Honorable James H. Quello*
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Honorable Rachelle B. Chong*
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Honorable Susan Ness*
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

Regina Keeney*
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Richard Welch*
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, DC 20554

David Ellen*
Federal Communications Commission
1919 M Street, N.W., Room 534Q
Washington, DC 20554

ITS, Inc.*
2100 M Street, N.W., Suite 140
Washington, DC 20037

John W. Gray
Senior Assistant General Counsel
Oklahoma Corporation Commission
P.O. Box 52000-2000
Oklahoma City, OK 73152-2000

Michael K. Kellogg
Austin C. Schlick
Jonathan T. Molot
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1303 K Street, N.W., Suite 1000 West
Washington, DC 20005
Attorneys for SBC Communications, Inc.